United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-2079

To be argued by
ANTHONY J. D'A[illegible]

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 74-2079

M. SPIE[illegible] SONS OIL CORP.,
Plaintiff-Appellee,

against

B. P. OIL CORP.,
Defendant-Appellant,

and

STANDARD OIL COMPANY (OHIO),
Defendant.

[illegible] APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF OF PLAINTIFF-APPELLEE

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New York, New York
December 3, 1974

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No: 74-2079

M. SPIEGEL & SONS OIL CORP.,

Plaintiff-Appellee

-against-

B.P. OIL CORP., Defendant-Appellant,
and STANDARD OIL COMPANY (SOHIO),

Defendants.

On Appeal from the United States District
Court for the Eastern District of New York

BRIEF OF PLAINTIFF-APPELLEE

PRELIMINARY STATEMENT

In an artful attempt to mute the fact that M. Spiegel & Sons Oil Corp. ("Spiegel") is entirely dependent upon B.P. Oil Corp. ("BP") for its very existence, BP has cast the nature of the relationship between the parties in such a way that their roles are virtually reversed. Thus

BP claims that Spiegel was able to "extract" a favorable agreement from BP and its predecessor Sinclair Oil Corp. ("Sinclair") (Br. p. 5);* it argues that even without any assurance of continued gasoline supply and in spite of the present restraint in the mortgage market, Spiegel could easily obtain a mortgage loan on its gas station properties; and it contends that the institution of twenty-six foreclosure actions against Spiegel would have only a minimal impact on Spiegel's viability as a going enterprise.

In the process, BP pays scant heed to the Emergency Petroleum Allocation Act of 1973 ("EPA" or the "Act"), the essential predicate of which was Congress' finding that independent marketers such as Spiegel were so dependent upon the major oil companies that, without legislative intervention, their continued existence was imperiled. As Judge Judd found below, the Act mandates that the majors treat these independents in the same fashion as they had in 1972. And the invocation of the Act is especially appropriate here, for this case results from nothing less than BP's attempt to remove Spiegel as a competitive force in its market.

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*Unless otherwise indicated, references preceded by the abbreviation "Br." are to BP's Brief on Appeal.

STATEMENT OF FACTS

Spiegel is an independent marketer engaged in the wholesale distribution of branded and unbranded gasoline (A. 207-08). It currently supplies approximately 135 service stations located largely on Long Island and in New York City (A. 273). Spiegel owns fifty of these stations and leases another fifty under long term leases (A. 276). The remaining stations supplied by Spiegel are owned by its customers who are dependent upon Spiegel for their continued supply of gasoline (A. 41, 272-73). In those instances in which Spiegel owns either the fee or a leasehold interest, it leases the stations to independent retail operators on a long term basis, generally for a ten year term (A. 233). In the main, all of Spiegel's customers are typical neighborhood stations, either family run, or one or two men operations (A. 41).

Spiegel has served as an independent marketer of gasoline for the appellant since early 1950 (A. 206-08).*

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*The original distributorship agreement was between Spiegel and Sinclair (A.41-42). Sinclair was a refiner and distributor of gasoline and related products in the Eastern United States, and operated on both the retail and wholesale levels. It was acquired by BP in 1969, and approximately one year later, BP itself was acquired by Standard Oil of Ohio (Sohio). As a result of this transaction, BP became a wholly owned subsidiary of Sohio, while BP's parent company, The British Petroleum Company, Ltd., obtained a controlling interest in Sohio (A. 42-43). These transactions in no way affected Spiegel's status as a metropolitan distributor, for in 1969 BP renewed Sinclair's agreement with Spiegel (A.10-11,43-44,60). Former Sinclair personnel continue to operate BP, as for example, with Robert Griffin's appointment as the marketing vice-president for Sohio (A.85,152, 318). For the sake of convenience, unless otherwise indicated, references to BP will also encompass Sinclair.

The distributorship agreement which they executed was renewed every three years for an additional three year term (A.42). At no time, however, did the parties regard the agreement as one for only three years duration. To the contrary, BP assured and represented to Spiegel that the inclusion of such a three year term was nothing more than a formality required by standard company policy, and that in no event would the contract be subject to either termination or non-renewal unless Spiegel committed a breach of the agreement (A. 7, 221-33). In point of fact, BP did renew the agreement for over a twenty year period, until Spiegel grew to be its largest and most profitable distributor in the metropolitan area (A.61-84).*

Perhaps equally as important, the relationship between Spiegel and BP was far more than a mere supplier-distributor arrangement (A. 7-10, 42-43, 210-16). In fact, Spiegel served as a marketing arm for BP and was encouraged by it to locate and purchase gas station properties so as to increase the volume of its purchases from BP (A. 85, 207-12). In order to

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*This fact is established by a marketing report from appellant's own files. Although it concedes the authenticity of this report (Br. p. 7), BP suggests that it should be given no weight. Indeed, BP has little choice but to adopt this position, for it has consistently sought to explain its termination of Spiegel on cost grounds. Its own records are to the contrary, proving that its sales to Spiegel generated a gross and net profit of $610,987.00 and $525,405.00 respectively (A. 73). It is of some significance that BP's witnesses never even attempted to explain away this unequivocal documentary evidence.

facilitate this growth, BP provided Spiegel with the financing for the acquisition and construction of new gas stations in the metropolitan area (A. 7-10, 209-13).

Over 75 such marketing loans were extended to Spiegel during the course of its long relationship with BP (A. 42). In each case and without regard to how many years of the distributorship agreement then in force had passed, the loan was cast in the form of a mortgage with a term of fifteen years (A. 9, 210). Each of the mortgages provided that in the event BP elected to terminate the sale of gas to Spiegel, or if Spiegel converted the station to a non-BP brand, its maturity date would be accelerated immediately (A. 7-10, 86-88).

At the time that BP acquired Sinclair in 1969, it made a special effort to induce Spiegel and its other suppliers to stay with the company promising a long future relationship (A. 225-33, 367-68), and a continuation of the prior marketing loan program (A. 43-44, 85, 229-33). It was in light of these specific representations that Spiegel declined to find an alternate supplier and decided to cast its lot with BP (A. 10). Thus, in 1970, it signed a new distributorship agreement containing the usual three year term (A. 60). After the takeover BP actively encouraged Spiegel's continued expansion, approved twenty new Spiegel

stations and made several additional marketing loans to Spiegel as part of its program to expand the BP operations (A. 43-44, 235).

By early 1972, Spiegel was servicing 126 branded stations, and using BP unbranded gas to supply, in whole or in part, 15 private brand stations. And its mortgage indebtedness to BP exceeded $1,500,000.00 (A. 44).

In or about 1972, however, when it became evident that an energy crunch would strike the country, BP adopted a radical change in its marketing philosophy. It decided to terminate its relationship with independents, acquire their properties, and thus expand its company-owned retail operations under the name "Gas & Go" (A. 49-53, 93-98).*

BP hoped to accomplish this in Spiegel's case by terminating the sale of gasoline to it, thereby triggering the acceleration clauses in each of the mortgages. Thus in 1972, BP declared that it would not supply gas to Spiegel beyond June, 1973 (the expiration date of the last distributorship agreement), and demanded at the same time that Spiegel pay it the sum of $1,500,000.00, the then balance

*Although in 1973 BP denied any intention to expand its company operated network of stations on Long Island (A. 19, 49-51, 132-33), that denial has since proven false (A. 93, 94-98, 303-04, 307-09, 360).

due on the mortgages (A. 152).*

By this time the energy shortage was beginning to be felt and Spiegel was unable to find an alternate supplier or a substitute mortgage lender (A. 8-13, 45, 242-43).

Matters continued in this fashion until April, 1973, when Spiegel joined with three other independent distributors which BP had terminated to commence an action against it in the District Court of New Jersey (A. 16, 244).** In substance, the complaint alleged only that BP's refusal to deal with plaintiff was in furtherance of an attempt to monopolize in violation of the Sherman Act. (The amended complaint in that action is annexed as Exhibit "A" to the Gay affidavit, and forms part of the Record on Appeal). Plaintiffs moved for a preliminary injunction on this ground but when no decision was rendered by June 30, 1973, BP terminated Spiegel's supply of gasoline (A. 45-46). For

*In conjunction with this demand, BP also proceeded to commit a series of predatory acts which were designed to further diminish Spiegel's ability to compete (A. 11-20, 25-34, 51-53, 132-33, 236-43, 318-20, 350-52). The bulk of these acts were at no time denied by BP during the proceedings below.

**In addition to Spiegel, the New Jersey action was commenced by Spiegel Oil Corporation Staten Island ("SSI"), and two wholly owned subsidiaries of SSI, all of which: (a) operated in New Jersey; (b) purchased unbranded gas from BP pursuant to an oral agreement, rather than a written distributor's contract; and (c) had already been terminated at the time the action was commenced. Spiegel held a 50% interest in SSI, with the remainder held by a third party (A. 162-63).

the following eleven days, Spiegel and its customers were without gas, and their stations were closed (A. 252). In addition, by that date BP had already commenced foreclosure actions in Nassau and Suffolk Counties against eleven of Spiegel's gas stations (A. 46, 113, 252). The threatened loss of Spiegel's business had become a reality (A. 251-61), and as Judge Judd found, Spiegel was "in desperate straits" (A. 369).

Thus, on July 11, 1974, Spiegel's secretary-treasurer was sent to BP's main office in Atlanta, Georgia with the instruction to do whatever he had to do to obtain supply (A. 253-53, 369-70). And on that same day, Lawrence Spiegel who was not accompanied by counsel, signed a settlement agreement presented to him by BP. The price extracted by BP for a one year supply of gas and the concomitant extension of the mortgages to June 30, 1974, was a general release by Spiegel, and the discontinuance of its breach of contract* and anti-trust actions (A. 90-91). As a further condition, BP extracted from Spiegel a payment of $400,000.00 in reduction of its $1,500,000 mortgage indebtedness, an increase in the interest rate on the various mortgages from an amount varying

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*Spiegel had filed a claim for breach of contract against BP in the Southern District of New York. That claim was based upon BP's refusal to deliver gasoline to Spiegel's New York City stations after July 1, 1972, one year prior to the expiration of the distributorship agreement (A.13-14,89,236-41,350-52,369). The reason proffered by BP for the termination (A.89) was later denied under oath by a BP official while testifying before Congress

(continued next page)

between 4 and 6% to 7-1/2%, and its acceptance of a new arrangement wherein Spiegel: (A) would lose the right to use BP credit cards in its operations; (B) would be supplied with unbranded, rather than BP branded gas; (C) would cease using BP signs or the BP trademark; and (D) would receive a supply of gasoline substantially less than the volume previously delivered by BP (A. 90-91).

It was also on July 11, 1973, but after the execution of the settlement agreement in Atlanta, Georgia, that Judge Whipple finally filed his decision in the New Jersey action. (A. 255; Br. p. 2). Holding that at that early stage of the litigation Spiegel had presented insufficient evidence to support its monopolization charge (A. 169), the Court denied the injunction. Nevertheless, it is of some significance that Judge Whipple, like Judge Judd, found that Spiegel would suffer irreparable harm as a result of BP's termination (A. 169).*

Pursuant to the terms of the July 11, 1973 agreement, Spiegel also executed a stipulation discontinuing the Jersey

(footnote continued from preceding page)

(A.319-20). Spiegel was compelled to close eleven stations as a result of BP's breach (A. 369, 241, 14), but found substitute suppliers for the remainder. However, none of these suppliers were willing to assume the mortgages on those stations (A. 45, 369).

*A copy of the Court's opinion is annexed as Exhibit "B" to the Gay affidavit, and forms part of the Record on Appeal.

action and delivered it to BP's counsel (A. 173). Similarly, Spiegel executed a stipulation discontinuing both of the foreclosure actions commenced by BP in the Supreme Court of the State of New York (A. 170), as well as the action pending in the District Court for the Southern District of New York (A. 170). All of the foregoing stipulations were filed by BP's counsel, save for the stipulation discontinuing the Jersey action; that stipulation was executed by its counsel, but was never filed with the Court.

The Proceedings Below

In November 1973 Congress enacted the EPA in direct response to the widespread difficulties occasioned by the gasoline shortage. As will hereinafter be discussed, the EPA was specifically designed to restore the relationship that existed between the oil companies and their customers during the base year 1972.

Despite this clear congressional mandate, BP pressed its plan to eliminate Spiegel and threatened to cut off its supply of gas if, by June 30, 1974, Spiegel defaulted in paying $894,000.00, the then balance due on the mortgages. Since Spiegel was in no position to pay so large a sum, it commenced the instant action seeking a preliminary injunction (A. 47-50).

In substance, Spiegel asserted in the Court below

that the threatened termination of gasoline supply and the acceleration of its mortgage indebtedness was prohibited by the EPA. As part of its action, Spiegel also asserted anti-trust and common law claims which provided ample basis for the injunctive relief sought. And finally, Spiegel sought to set aside the July 11, 1973 agreement for duress (Verified complaint, A. 4-37).

In granting the preliminary injunction, Judge Judd grounded his opinion upon the provisions of the EPA, finding that Spiegel had demonstrated both irreparable harm and a substantial likelihood of success on the merits (A. 366-378). The Court found it unnecessary to pass upon Spiegel's anti-trust or common law claims, save to characterize the former as "apparently a substantial claim" (A. 376-77). The Court also denied BP's application at the hearing, to either transfer this action to New Jersey or stay its prosecution (A. 373). Thirty days after Judge Judd entered his order, BP filed a notice of appeal seeking review of his decision (A. 3).

BP desperately attempts to create the impression that the District Court's decision was "hurried" (Br. 9), and thus in error. Such intimations do an injustice to Judge Judd. As an examination of the record will reveal, the Court was fully familiar with the facts of the case on the return date of the Order to Show Cause (A. 118-19, 123-24, 131-34). At

that hearing, BP offered no live testimony, but instead, submitted an affidavit to the Court. When the Court granted the restraining order sought by Spiegel, and set the matter down for a hearing, BP's sole request was for an acceleration of the hearing date (A. 137). That request was later granted by the Court (Br. 3), and a hearing was held on July 12, 1974. BP submitted voluminous affidavits, an extensive brief, and live testimony at that hearing, and was in no way precluded from offering further testimony or proof. Once again, Judge Judd proved fully familiar with the issues and in point of fact, it was he who requested at the hearing and later received from BP a memorandum on the EPA (A. 343-44). A full two weeks later, he issued his decision. Under these circumstances, and especially since BP failed to submit a brief on the EPA points until the Judge requested it, it is simply unfair for BP to denigrate the Court's performance. It may disagree with the Court's opinion, but no other criticism is warranted. On the contrary, as the record will reveal, Judge Judd's decision is fully supported by both the facts and the applicable law.

Questions Presented

1. Does this Court have jurisdiction to review

an injunction based exclusively upon the EPA?*

2. Did Judge Judd abuse his discretion in finding:

(a) that Spiegel has raised serious questions going to the merits of its claim under the EPA;

(b) that the balance of hardship tips decidedly in favor of Spiegel; and,

(c) that in view of the foregoing, the _status quo_ should be maintained?

3. Did Judge Judd abuse his discretion in denying BP's application to transfer this case to the District Court for New Jersey?

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*On November 19, 1974, Spiegel brought on a motion to dismiss this appeal for lack of jurisdiction. In brief, since the EPA incorporates by reference Section 211 of the Economic Stabilization Act of 1971, it is Spiegel's position that Judge Judd's order is appealable only to the Temporary Emergency Court of Appeals. Without deciding the motion, the Court ordered that the briefs and affidavits submitted by the parties on the jurisdictional issue be referred to the panel of Judges who will consider this appeal. For this reason, Spiegel will not repeat in this memorandum any arguments addressed to the threshhold question of whether this Court has jurisdiction over this matter.

POINT I

THE THREATENED ACCELERATION OF THE MORTGAGES AND TERMINATION OF GASOLINE SUPPLY IS PROHIBITED BY THE EPA.

BP's brief is a studied attempt to minimize the impact of the EPA by stressing the transfer and irreparable harm questions. However, the EPA is the standard by which all questions on this appeal must be measured. The Act was the legal basis upon which the injunction below was granted. It is the existence of the Act that makes this case radically different from the prior New Jersey action. And it is the legislative history of the Act that demonstrates the harm that will result to Spiegel and to the public if BP were permitted to succeed in its plan. For these reasons, resort must be had to the Act in considering the merits of BP's appeal.

There can be little doubt but that the EPA was enacted to prevent the elimination of independent wholesalers and retailers as a competitive force in the oil industry. Indeed, the Act itself states Congress' intent to "preserve the competitive vitality of [the] independent" segment of the industry. §4(b)(1)(D),(F),(H) and (I). Similarly, the Report of the Committee on Interstate and Foreign Commerce describes the Act as one designed to "guarantee to independent branded marketers and independent nonbranded marketers of petroleum products supply equal to that which they were able

to obtain in calendar year 1972...."* H.R.Rep.No.93-431, 93d Cong., 1st Sess. 5 (1973) (hereinafter "Committee Report"). The Act also specifically prohibits an integrated oil company such as BP from favoring its company-owned stations over independents in the supply of gasoline. See generally, Hearings on H.R. 8089 Before the House Comm. on Interstate & Foreign Commerce, 93rd Congress, 1st Sess. 46-47, 50-52, 71, 101, 110-15, 142, 144-47, 161-62, 199-200, 244-45, 274, 290, 303 and 308-09 (hereinafter "Hearings"). And it reflects Congress' concern that the oil companies would seize upon the energy crisis to increase their vertical integration at the expense of the independents.** See Committee Report at 18-19; Hearings at 140, 206, 244, 292 and 308. See also FTC Staff Report, CCH Energy Management ¶9752.

In order to insure the continued existence of this independent segment of the market, Congress mandated that refined

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*It has been conservatively estimated that over 2,000 independent marketers were compelled to close down by July, 1973. Id. at p. 9; Hearings on H.R. 8089 Before the House Comm. on Interstate & Foreign Commerce, 93rd Cong., 1st Sess. 21 (1973). Since that date and up to the time of the Act, the number of indepedents driven from the marketplace increased dramatically. Committee Report at p. 9.

**This is precisely what BP seeks to do in the case at bar. BP has already attempted to terminate those independent retailers on Long Island who leased their station from it. These stations are marked for conversion to BP's new chain of company-operated Gas & Go stations (A. 49-53, 93-98, 303-09). BP seeks here to effect a similar takeover of Spiegel by the simple expedient of accelerating its marketing loans.

petroleum products be allocated to independent marketers in proportion to the volume supplied by the integrated oil company to the independent during the "base period" year of 1972. See 10 C.F.R. §§211.11(b), and 211.104(a). In effect, Congress sought to restore and preserve the status quo ante as it existed in 1972, before the advent of the energy crisis. See Brennan Petroleum Products Co. v. Pasco Petroleum Co., 373 F.Supp. 1312, 1317 (D.C. Ariz. 1974). Moreover, suppliers such as BP are obliged to provide their base period customers with an allocation even if the distributorship agreement was cancelled or the supplier-purchaser relationship in issue was terminated since the base period. See, FEO Ruling dated February, 1974, CCH Energy Management Rep., ¶16,013 at pp. 16, 013-17. As the Act makes clear then, no matter what the attempted justification, BP is obliged to supply Spiegel with gasoline.

However, prior to the commencement of this action and even after it was well under way, BP took the position that it would be relieved of its obligation under the Act to supply gas, if Spiegel defaulted in paying the full amount of its mortgages on June 30, 1974.* Then, in a retreat that was more apparent than real, BP urged at the second hearing before Judge Judd, as it does before this Court, that while it would be

*In point of fact, BP has consistently adopted the position that any default by Spiegel under the July 1973 agreement would relieve it of the obligation to supply gasoline (A. 114, 149, 160).

obliged to supply gas even after such a "default", it should be free to accelerate and foreclose upon the mortgages and otherwise attempt to collect their face amount from Spiegel and its principals, because the Act does not prohibit such actions.

In advancing this contention, BP never comes to grips with the fact that with the foreclosure proceedings, there would be no stations that could accept its "offer" of gasoline. Instead, it advances a truncated view of the Act that would result in its escape from what the Act concededly requires it to do. This attempt to do indirectly that which it cannot do directly is violative of both the letter and spirit of the Act.

For instance, §210.62 of the Regulations provides that BP must deal with purchasers according to their normal business relations. The Regulation states:

> "(a) <u>Suppliers will deal with purchasers according to normal business practices</u>. Nothing in this program shall be construed to require suppliers to sell to purchasers who do not arrange proper credit or payments for products. However, <u>no supplier may require or impose more stringent credit terms or payment schedules on purchasers than the normal business practice of the supplier for that class of purchaser</u> (e.g. COD purchasers) <u>during the base period, nor may any supplier modify any other normal business practice so as to result in</u>

circumvention of any provision of this chapter." 10 C.F.R. §210.62 (Emphasis added)

Under any view of the facts, this is precisely what BP proposes to do. It seeks to ignore the normal business relations which existed between the parties to this action for over twenty-one years, by demanding payment of the mortgages at a time when the requisite purchaser-seller relationship continues to exist. Likewise, it seeks to impose more stringent credit terms upon Spiegel by demanding payment of the mortgages in full, rather than through the customary monthly installments. This no doubt constitutes a "more stringent payment schedule" within the meaning of the Regulation, as well.

BP's attempt to limit §210.62(a) to gasoline, to the exclusion of every other facet of the relationship between a supplier and its customer, would subvert the very mandate of the Act. For example, a supplier would be free to insist that the dealer now arrange for delivery of gasoline to his station at his own cost; that while the dealer may have had sixty days to pay for tires, batteries and other accessories in 1972, such sales would now be made only on a C.O.D. basis; or that marketing equipment, (e.g., signs, tanks, mechanical equipment) previously loaned to the station would now have to be rented or purchased. And BP would urge that the supplier could implement

such drastic changes in normal business relations even if it resulted in a circumvention of the Act, simply because the quantity or price of gasoline was not affected. Clearly, this was not the intent of Congress, and it is not an arguable interpretation of the Act. In point of fact, if one does not interpret "normal business relations" to encompass all of the relations between the parties, there would be no reason for §210.62(a) to exist at all. For both the supply and price of gasoline are amply covered elsewhere, and the relations between a supplier and its customers are specifically fixed with respect to those items. See, e.g., 10 C.F.R. §§211.1 and 212.1., _et seq_. Of necessity, then, §210.62 and its insistence upon the maintenance of normal business practices must encompass Spiegel's mortgage indebtedness to BP.

Moreover, as Judge Judd found, BP's restrictive interpretation of this section also ignores the fact that its marketing loans to Spiegel were not isolated real estate transactions, but were inextricably tied to Spiegel's distribution of BP gas (A. 7-10). Indeed, BP itself characterized these transactions as "marketing loans", and computed its profit per gallon on sales to Spiegel with due allowance for the outstanding mortgage indebtedness (A. 61-84). Thus, even if BP's restrictive interpretation of §210.62 is applied to the facts of this case, it cannot defeat Spiegel's right to an injunction. For in the language of the Court below, "the monthly payment schedule on

the mortgages was part of the credit terms relating to [the] distribution of gasoline" (A. 376).

In addition, the threatened acceleration of the mortgages is really an unlawful increase in "price", as that term is defined in the Act. Thus, §212.82(a) provides that except under certain circumstances not relevant here, "a refiner may not charge to any class of purchaser a price in excess of the base price of that covered product...."

Section 212.31 provides that the term "price" encompasses "any consideration for the sale or lease of any property or service and includes rent, commissions, dues, fees, margins, rates, charges, tariffs, fares or premiums, regardless of form." When these provisions are examined in conjunction with 10 C.F.R. §210.62(c), it becomes abundantly clear that BP is simply attempting to increase the "price" Spiegel will have to pay for its continued supply of gasoline. The latter section provides:

> "(c) <u>Any practice which constitutes a means to obtain a price higher than is permitted by the regulations in this chapter or to impose terms or conditions not customarily imposed upon the sale of an allocated product is a violation of these regulations. Such practices include</u>, but are not limited to devices making use of inducements, commissions, kickbacks, retroactive increases, transportation

arrangements, premiums, discounts, special privileges, tie-in agreements, trade understandings, falsification of records, substitution of inferior commodities or failure to provide the same services and equipment previously sold." (Emphasis added).

For an FEO ruling in this regard, see CCH Energy Management Rep., Ruling 1974-10, ¶16,020, at pp. 16024-25. In sum, then, there can be no question but that by insisting on immediate payment of an obligation intended to be long term, BP is increasing the cost of Spiegel's credit, and thus the price it must pay for its gasoline.*

BP's attempt to accelerate its marketing loans is also unlawful because it will necessarily result in a circumvention of the Act. As Judge Judd found, foreclosure proceedings would cause Spiegel's demise and result in relieving BP of its obligation to supply gas (A. 307-308) an event squarely prohibited by the Act itself. 10 C.F.R. §210.62. This is particularly true since if Spiegel were to

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*BP did not deny in the proceedings below that the effect of accelerating the mortgages would be to increase the price Spiegel would have to pay for each gallon of BP gas. Cf. CCH Energy Management Rep., Ruling 1974-10, ¶16,020 at pp. 16,024-25. Moreover, it is simply not in a position to do so. The amount and duration of the loans were always considered in terms of Spiegel's gasoline purchases, and analyzed on a per gallon basis insofar as cost and profitability were concerned. This was not only logical, but it was and remains a common commercial practice (A. 61-84).

Parenthetically, it is not without significance that Sohio, BP's parent and codefendant, has already been found to be in violation

(continued next page)

go out of business, BP would have no obligation to sell to Spiegel's customers, and correlatively, those customers would have no right to Spiegel's allocation. 10 C.F.R. §§211.9, 211.11(d). This is not the first time BP has sought to circumvent the Act with such tactics (A. 99-106).

Finally, BP's claim that the mortgages must be completely divorced from the sale of gasoline is belied by its own conduct. It was BP itself which conditioned the mortgages on the continued purchaser-seller relationship between Spiegel and it (A. 7-10). This had been the practice of the parties for well over twenty-five years (A. 42). And this interdependency was actually preserved by the July agreement, which provided for the continued sale of gas to Spiegel, and a continued carrying of the mortgages until June 30, 1974 (A. 90, 169).

This interdependence between the sale of gasoline and other aspects of the supplier-purchaser relationship has been noted by those courts having occasion to consider the issue. In fact, in Shell Oil Co. v. Marinello, 63 N.J. 402, 302 A. 2d 598 (N.J. Sup. Ct. 1973), the Court rejected a similar attempt to truncate a lease and supply agreement,

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(footnote continued from preceding page)

of this section respecting unlawful increases in price, and is now subject to a restraining order issued by the FEO. The Standard Oil Company, CCH Energy Management Rep., ¶21,659 at p. 21,677 (10/21/74).

stating:

> "Shell argues that its lease of the service station premises to Marinello is independent of its dealer agreement... and that its legal rights as a landlord under the lease are absolute and cannot be restricted. This is pure sophisrty. The two contractual documents are but part of an integrated business relationship...." Id. at 407.

To the same effect is Division of Triple T Service, Inc. v. Mobil Corp., 304 N.Y.S.2d 191 (Sup. Ct. Westchester County 1969), where the Court found that the oil company's lease and dealership contract were inseparable, and noted that a contrary interpretation would result in a "holding that the parties had intended plaintiff to have a 'floating' franchise which is akin to giving plaintiff a paddle in a dry creek...." Id. at 201.

This same conclusion is mandated by the facts at bar. This Court should hold that the continued existence of the purchaser-seller relationship, without more, provides the requisite basis for the extension of the mortgages. This would not only be in accord with the terms of the mortgages, but it is consistent with the expressed intent of the parties over the years.

In sum, BP's attempt to divorce its obligation to supply gas from the obligation to continue the mortgages in

force is unpersuasive, for it ignores the fact that the Act is designed to restore the status quo ante. If the Act had been in force in June, 1973, when the last distributorship agreement was to terminate, BP would not have been able to exact an agreement from Spiegel limiting the supply of gas and the duration of the mortgages for only one more year. On the contrary, if the Act were then in effect, BP would have been obliged to continue that supply and it would not have been able to accelerate the mortgages because its ability to accelerate is conditioned upon its right to terminate the supply of gas.

Since the Act is retroactive in nature, BP's rights must be measured as if the Act were in force when it attempted to accelerate. So considered, it is apparent that BP's demand for payment is improper.

Nor is its claim that it is being deprived of a property right persuasive. The Act involved here does not declare the mortgages to be null and void. Compare Sierra Pacific Power Co. v. FPC, 223 F. 2d 605 (D.C. Cir. 1955), aff'd. 250 U.S. 348 (1956), and FPC v. Niagara Mohawk Power Corp., 347 U.S. 239 (1954). Rather, it is conceded here that Spiegel must continue to pay the mortgages according to their terms. The only effect the EPA has is to suspend temporarily BP's right to accelerate those mortgages. Far more stringent moratoriums, enacted in times of national emergency, have been uniformly upheld by

the courts. See, e.g. East New York Savings Bank v. Hahn, 293 N.Y. 622 (1944); Block v. Hirsh, 256 U.S. 135 (1921); Strauss v. Union Central Life Ins. Co., 170 N.Y. 349 (1902); Steinberg v. Delano Arms, Inc., 226 N.Y.S. 2d 862 (2d Dept. 1962).

For all of the foregoing reasons then, it should be manifest that Judge Judd's decision to restrain BP can hardly be termed an abuse of discretion. See, e.g., Deckert v. Independence Shares Corp., 311 U.S. 282 (1940). To the contrary, the decision below is fully supported by the facts and the law; it is designed to preserve the status quo; and it in no way harms BP, while saving Spiegel from certain extinction. In short, the injunction was within the sound discretion of the Court.

POINT II

PLAINTIFF WILL SUFFER IRREPARABLE HARM IF ACCELERATION IS PERMITTED

The bulk of BP's brief is taken up with an attack on Judge Judd's finding that Spiegel would suffer irreparable harm if BP were permitted to accelerate the mortgages. The nature of this attack is significant more for what it omits than for what it states.

BP does not contend that Spiegel or its principals are in a position immediately to pay the balance due on the mortgages.* Nor does BP attempt to controvert Spiegel's testimony that the institution of foreclosure proceedings would result in the end of its business. On the contrary, the whole of BP's argument is predicated on the unsupported assumption that Spiegel could easily refinance the mortgages and pay BP off.

When it is considered that Spiegel is assured of continued gasoline and therefore of the means to pay new mortgages only until February, 1975, when the Act is scheduled to expire; and that, because of the gas shortage, gas stations are being consolidated rather than expanded; and that added to these difficulties is the general unavailability of mortgage

*Although BP takes issue with the lower court's finding as to Spiegel's net worth, the critical factor is that all of that net worth is tied up in gas station properties and is only as valuable as Spiegel's ability to obtain continuation of supply (A. 255-99, 371).

loans, BP's claim that Spiegel could readily obtain refinancing only shows how insensitive it is to the consequences of its own actions, and how out of touch it is with the economic realities affecting a business the size of Spiegel. In short, BP would have this Court believe that Spiegel has undertaken the heavy burden and expense of this litigation to save a few thousand tax deductible dollars a month.

Nothing could be further from the truth. What lender, after all, would extend an $800,000 loan to a purveyor of gasoline in the face of the announced intention of its supplier to cut off gasoline on February 28, 1975? What lender would run the risk that no alternate supplier could be found (even BP does not claim that alternate gasoline suppliers are available)? What lender would make a loan knowing that it might not be repaid out of the company's earnings? What lender would accept as collateral for so large a loan, not a single property with a high appraised value, but widely scattered gasoline properties of questionable value and marketability? What lender would extend a loan now knowing that a few months hence it may be engaged in a multifaceted foreclosure action with all of the attendant delays and expenses?

The simple answer is that there are no such lenders, a fact painfully learned by Spiegel in its long and fruitless search for refinancing (A. 45, 251-59, 371). And the unavailability of credit to Spiegel is not a factor of the interest

it is willing to pay, but of the inherent unbankability of of the loan itself.

If, as BP claims, it is easy to obtain substitute financing, one would think that it or Sohio, with all of their many banking contacts and all of their economic power, would have been able to prevail upon one of their banks to extend this loan Spiegel cannot get. Indeed, only recently BP and Sohio announced that they had borrowed one billion dollars from over 18 banks to finance the Alaska pipeline alone (A. 361). Surely, if Spiegel were such an attractive credit risk, one of these banks would make the relatively modest loan sought by Spiegel. Yet, far from suggesting that one of its powerful banks would consider such a loan, BP urged upon Judge Judd the possibility that Spiegel could get financing because one of its "dealers may be related to the local bank president...." (Br. p. 23).

This cavalier attitude permeates the whole of BP's claim. What it fails to recognize is that its own desire to cut off the gas is the cause of Spiegel's inability to obtain financing (A. 45, 282-283). And it is also the cause of Spiegel's inability to sell the properties (A. 277-280). Just as no bank would lend because of the lack of gas, no retail dealer would invest his capital or obtain bank financing to purchase a station from Spiegel with gasoline assured only to February 28, 1975.

It is thus apparent that the consequences of BP's determination to cut off the gas widen and touch on every aspect of Spiegel's viability. Spiegel's ability to refinance or to sell is so inexorably wound up with the continued supply of gas that he cannot do the former without assurance of the latter. BP's claims to the contrary are nothing less than commercially incredible.

Since Spiegel cannot obtain new financing, it would have had no choice but to suffer the institution of foreclosure proceedings and the forced sale of its properties (A. 258-59). There is no question, and BP has not even attempted to controvert the fact, that these actions would strike at the very heart of Spiegel's business, causing its demise.

The institution of foreclosure actions will, perforce, trigger the calling of Spiegel's loans by other lenders, one of whom made the loan from which Spiegel was able to pay the $400,000 called for by the July agreement (A. 259). At a forced or other sale of the properties now, less than the mortgage amounts would be realized, subjecting Spiegel and the members of the family to a deficiency judgment and the loss of the equity it built up through years of effort (A. 258-60).

Spiegel's customers, deprived of their source of supply, would face the same demise. The hard work which Spiegel and

its customers invested in their stations would be forfeited; the goodwill they have nurtured would be lost. Its cash flow cut off, Spiegel would be unable to finance this litigation, which will no doubt prove both lengthy and costly. And even if it were able to pursue BP for its unlawful and unconscionable conduct, the resultant judgment will come much too late. Moreover, this remedy would not even be available to Spiegel's customers, who will suffer the same destruction which confronts plaintiff unless the injunction is affirmed. One could not picture a case in which the term "irreparable harm" could be more meaningful.

When this result is measured against the consequences to BP resulting from that injunction, it is clear that the relief granted by Judge Judd was fully justified. BP itself admits that it is obliged to supply Spiegel with gasoline supply. Moreover, it now has more available supply than at any time in the immediate past (A. 371). Spiegel is now making and will continue to make the normal monthly payments on its mortgages. In addition, since the July agreement, interest on the mortgages is being paid at the increased rate of 7-1/2% (A. 90). This interest factor (an amount obviously satisfactory to BP since it was exacted at a time when at the least, its bargaining position was superior), taken together with the profits realized on the sale of gasoline to Spiegel (A. 61-84),

demonstrate that BP's money is not nearly so "cheap" as it suggests.* Similarly, BP and its parent Sohio, one of the largest companies in the country, cannot really claim that they are in dire need of the immediate payment of the mortgage indebtedness (A. 5, 52-53, 361).

Since the harm resulting to plaintiff from the denial of the injunction is far greater than any harm BP might suffer, this Court should affirm Judge Judd's attempt to preserve the _status quo_ during the litigation. See, e.g., _Checker Motors Corp_. v. _Chrysler Corp_., 405 F.2d 319, 323 (2d Cir. 1969); _Semmes Motors, Inc_. v. _Ford Motor Corp_., 429 F.2d 1197 (2d Cir. 1970); _Milson Co_. v. _Southland Corp_., 454 F.2d 363 (7th Cir. 1972).** This is especially true since the

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*Any question that this lawsuit is about interest differentials is resolved by the July agreement. As part of that agreement Spiegel agreed to increase the interest rate payable to 7-1/2% from a much lower average rate. This increased rate is violative of the EPA, 10 C.F.R., §§210.62(a), 212.82, _et seq_., because it is in excess of the rate in effect during the base period. However, at no time since the passage of the Act or even now, has Spiegel challenged this increase, its only concern being the continuation of the mortgage loans. Similarly, any claim that Spiegel is somehow seeking to take advantage of BP is belied by its undisputed and herculean efforts to escape from the shackles of BP's marketing loans (A. 53, 278; Br. p. 25).

**Although the Court below applied the traditional irreparable harm test, it is of some significance that the FEO has proceeded in a far more radical manner. It has held that the oil company which seeks to establish that a particular regulation is not applicable to it or to any action it proposes to take, must first establish that it will suffer irreparable harm if the regulation is in fact applied to it. See, e.g., _The Standard Oil Company_, CCH Energy Management Rep. ¶21,659, at p. 21,677. If this standard were applied here, the burden of proving irreparable harm would fall not on Spiegel, but upon BP. TECA has not yet passed upon this point, so the applicability of this standard to civil actions such as the one at bar has not been determined.

public at large will be injured unless the preliminary injunction remains in force. See, e.g., Hecht Co. v. Bowles, 321 U.S. 321, 331 (1943); Estee Lauder, Inc. v. Watsky, 323 F. Supp. 1064 (S.D.N.Y.1970). Indeed, BP's plans would result in the closing of over one hundred independent retail gas stations in the metropolitan area. As the FEO found in connection with similar unlawful acts performed by BP in this marketing area, each such act irreparably injures not only the independent wholesaler or retailer, but the public interest as well (A. 99-106).

No sound reason exists for permitting such untoward consequences. Nor should BP be heard to say that an injunction requiring it to supply gas is unnecessary because it is voluntarily complying with the Act. In the first instance, it was not until this action was well under way that BP so clearly "saw" its obligation (A. 115, 149, 160). And perhaps even more importantly, BP has manifested a propensity to engage in violations of the Act.* Under these circumstances, the

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*BP and its parent have already been found to be in wholesale violation of the Act. For example, the FEO entered an Order in May, 1974, finding that defendants had: (1) accumulated excessive and illegal inventories; (2) supplied non-base period customers; (3) discriminated against base-period customers; and (4) falsely reported to the FEO invalid and inaccurate data concerning its allocation fractions and available supply. (A. 99-106). As noted earlier, this has not been BP's only violation of the Act. See, e.g., The Standard Oil Company, CCH Energy Management Rep. ¶21,659, at p. 21,677.

injunction should remain in effect.*

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*BP's claim that the injunction should be vacated because of <u>adverse</u> publicity is specious, especially since much of it was generated by its own employee (A. 356). Moreover, BP and its parent are often the subject of publicity. Sohio made the front page of the Times and an inside story in the New York Post when the FTC brought action to break up interlocking directorates (A. 363-64). BP made the Times again when the FEO charged that it deliberately violated the EPA (A. 632); its intention to put independents out of business was the subject of a Newsday article (A. 360), and its difficulty in complying with the divesture provisions of an antitrust decree was the subject of a Wall Street Journal article (A. 365). Even when money is borrowed BP and Sohio make news (A. 361). Similarly, since the commencement of this action, BP and Sohio have continued to generate "adverse publicity". For example, on October 31, 1974, the Federal Trade Commission issued a complaint accusing Sohio and three other oil companies of conspiracy to restrain trade. The fact is that BP often makes news - some of it good, most of it bad. Under these circumstances, the impact of an injunction here is minimal, and certainly not a sufficient basis for its denial.

POINT III

THE COURT BELOW DID NOT ABUSE ITS DISCRETION IN DENYING BP'S MOTION TO TRANSFER THIS CASE TO NEW JERSEY

From the outset of this litigation BP has been obsessed with the notion of transferring this case to New Jersey. At first it argued that since Spiegel was challenging the settlement agreement, only Judge Whipple could pass on that claim because the settlement was allegedly reached in his chambers. However, BP could not muster facts to support this claim (A. 251-54, 335-37, 342-43), and could not overcome the well settled principle permitting a party to challenge settlement agreements executed under duress in any court of competent jurisdiction. Fed.R. Civ. P. 60(b). See also: First National Bank of Cincinnati v. Pepper, 454 F.2d 626 (2d Cir. 1972); Griffith v. Bank of New York, 147 F.2d 899 (2d Cir. 1945); Hadden v. Rumsey Products, Inc. 196 F.2d 92 (2d Cir. 1952).*

Accordingly, BP changed stride and attempted to fit this case within the rubric of Semmes Motors Inc. v. Ford Motor Co., 429 F.2d 1197 (2d Cir. 1970), claiming that because of the

*Parenthetically, one must question the magic BP attributes to the New Jersey action, for the July agreement was concededly executed in Atlanta, Georgia, and "settled" not only the Jersey case, but also the action pending in the Southern District of New York, and the two foreclosure actions BP had commenced in the New York State Supreme Court. Spiegel had asserted BP's wrongful course of conduct as a counterclaim in those actions, and many of the same issues were raised there. If carried to its logical extreme, then, BP's position would compel Spiegel to move in each of these courts to set aside the July agreement for duress.

prior New Jersey action, it was exposed to multiple and vexatious lawsuits. Plainly, however, Semmes is wholly inapplicable to the case at bar.

In the first instance, BP's claim that Spiegel is litigating "essentially the same dispute simultaneously in different jurisdictions" (Br. p. 15; emphasis added) is not supported by the facts. The fact is that the New Jersey action was effectively terminated in July, 1973, when Spiegel entered into a settlement with BP, and had its counsel sign and deliver a stipulation of discontinuance (A. 173). Since that time, Spiegel has taken no action in that case and has done nothing to reactivate it. Thus, there is nothing pending in the New Jersey action to which BP can legitimately point in support of its claim of "simultaneous actions". Nor is this deficiency cured by the fact that BP elected not to file the stipulation of discontinuance. This precise question was presented to this Court in Sampson v. Sony Corp. of America, 434 F.2d 312 (2d Cir. 1970), where it was held that the filing of such a stipulation was not required to bind the parties which executed it.

Thus, unlike the defendant in Semmes, BP is not exposed to duplicative actions. In addition, and again unlike the situation in Semmes where the New Jersey court was not disposed to relinquish its jurisdiction over the matter, Judge Whipple recently denied BP's motion to restrain the prosecution of this

action holding that the propriety of this action was properly before this Court. See, MSS Economy Oil Corp. v. BP Oil Corp., Civ. No. 554-73 (D.N.J., filed October 25, 1974). Surely this result would not have followed if Judge Whipple felt that Spiegel's 1973 action was still pending before him.

Semmes is also inapplicable because the action pending in New York is substantially different than the one brought in New Jersey. The two actions not only involve different parties, but the verified complaint in the New York action sets forth some causes of action which were not alleged there, others which continued to exist after July, 1973, and still other causes which arose for the first time subsequent to the alleged settlement (A. 14-17, 18-20, 23-25, 29-30). For example, Count I of the New York complaint is grounded upon the EPA, an Act which was not in existence at the time the Jersey action was commenced, and thus could not have been raised there. Similarly, this action alleges causes of action: for antitrust violations not heretofore asserted; for breach of contract; for violations of Rule 10B(5) of the Securities Act of 1933; for common law fraud; for prima facie tort, unfair competition and tortious interference with Spiegel's contractual relationships; under New York's Donnelly Act; for violation of §§1-203 and 2-615 of the Uniform Commercial Code; for promissory estoppel; and for duress (A. 4-27). In sum, the relief sought in New York is far more expansive than that requested over a year

ago in Jersey, and is grounded upon no less than 15 causes of action which were not alleged in the Jersey action. Thus, BP's claim that the two actions are identical, is flatly contradicted by the record.

The fact that this action is substantially different from and raises issues not part of the New Jersey action is sufficient to bar a stay of this case even if the New Jersey action were still pending. The courts have consistently permitted a second action to continue when it will be dispositive of all of the issues in controversy. Hammett v. Warner Bros. Pictures, 176 F. 2d 145 (2d Cir. 1949); Lucerne Products Inc. v. Skil Corp., 441 F. 2d 1127 (6th Cir. 1971); Thermal Dynamics Corp. v. Union Carbide Corp., 214 F. Supp. 773 (S.D.N.Y. 1963); Boots Aircraft Nut Corp. v. Kaynar Manufacturing Co., 183 F. Supp. 126 (E.D.N.Y. 1960).

BP's reliance on Semmes is also misplaced because the rule it applied is not nearly as rigid as it implies.

As this Court noted in Hammett v. Warner Bros., supra, the rule of priority "is not to be applied in a mechanical way regardless of other considerations". Id. at 150.

The court should favor the action which was instituted first only when it finds in its discretion that the balance of convenience favors the continued maintenance of the action there, rather than in the second court. Delamere Company, Inc. v. Taylor-Bell Co., Inc., 199 F.Supp. 55,57 (S.D.N.Y. 1961).

The federal courts have traditionally approached the convenience test in terms of forum non conveniens. See e.g., Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947); United States v. Fluor Corp., Ltd., 436 F.2d 383 (2d Cir. 1970); William Gluckin & Co. v. International Playtex Corp., 407 F. 2d 177 (2d Cir. 1969). Extended analysis is not necessary to establish that the application of this standard here would leave no doubt but that this case should properly be litigated in the Eastern District. This is particularly true since 25 of the 26 properties upon which BP holds mortgages are located in New York (A. 357-58). Not even BP has sought to depict the New York Court as an inconvenient forum in which to try this case. This, without more, should be dispositive.

In conclusion then, the essential question is whether

the District Court abused its discretion in refusing to transfer this case to New Jersey. As the Supreme Court noted in Kerotest Manufacturing Co. v. C-O-Two Fire Equipment Co., 342 U.S. 180, 183-84 (1952):

> "Wise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation, does not counsel rigid mechanical solution of such problems. The factors relevant to wise administration here are equitable in nature. Necessarily, an ample degree of discretion, appropriate for disciplined and experienced judges, must be left to the lower courts."

Because BP cannot legitimately claim that it is presented with multiple and vexatious litigation, since this action involves a statute of controlling significance not in existence at the time the New Jersey action was terminated, and because absolutely no convenience would be served by transferring this case to Jersey, the decision below was well within the bounds of the Court's discretion and should be affirmed.

POINT IV

THERE ARE GROUNDS INDEPENDENT OF THE EPA TO SUPPORT THE GRANTING OF THE INJUNCTION.

Since Judge Judd based his decision upon the EPA, he found it unnecessary to consider the other grounds urged by Spiegel in support of its motion. These grounds, briefly summarized here, form an independent basis for the issuance of the injunction.

1. The extensions of credit by BP to Spiegel were conditioned upon and tied into the continued purchase of gasoline at a time when the amount and cost of that credit was not otherwise available (A.7-10, 43-45, 210-219, 282-83). This tie-in of the g , with the credit is violative of the Sherman Act. See, e.g., Fortner Enterprises v. U.S. Steel Corp., 394 U.S. 495 (1969); International Salt v. United States, 332 U.S. 392 (1947); Northern Pacific R.R. Co. v. United States, 356 U.S. 1 (1958); Simpson v. Union Oil Co., 377 U.S. 13 (1964)

In addition, Spiegel urges that the relationship imposed upon it by BP, with particular emphasis upon the mortgages which could be accelerated at any time at BP's

option, was so inherently anticompetitive as to be a per se violation of the Sherman Act. See, e.g., Wheel Center Co. v. Western Die Casting Co., 5 CCH Trade Cases ¶75,027 (N.D. Calif. 1974). In this case, BP used these acceleration provisions to convert Spiegel into a captive market establishing as the price of its freedom a mortgage debt in excess of one million dollars. Moreover, the acceleration provisions not only placed Spiegel firmly in BP's control, but they granted it an absolute veto power over its continued existence as a competitor on the wholesale and retail marketing levels (A. 7-24, 108). See, e.g. Simpson v. Union Oil Co., 277 U.S. 11 (1969); United States v. Associated Press, 53 F. Supp. 362 (S.D.N.Y. 1943), aff'd 326 U.S. 1 (1944); Poller v. Columbia Broadcasting System, 368 U.S. 464 (1961); United States v. R.J. Reynolds Tobacco Co., 5 CCH Trade Cases ¶45,070, at p. 53,403.

2. Over the years BP assured Spiegel of a continued supply of gasoline so long as it did not breach any of its obligations under the distributorship agreement. Consistent with the expectations of both parties for a long term relationship, the mortgage loans were each for 15 year terms; BP approved the leasing of properties for from 10 to 20 year terms; and it approved the sublease of those properties for similar terms (A. 211, 233). At the time BP took over from

Sinclair it made a special effort to induce Spiegel and its other suppliers to stay with the company, promising a long future relationship (A. 225-32); and a continuation of the prior marketing loan program (A. 43-44, 85). Moreover, BP itself did in fact make several additional long term mortgage loans to Spiegel (A. 43-44, 235). These representations (none of which have been controverted) give rise to a fiduciary relationship between the parties, the consequences of which prevent BP from terminating without just cause. See, e.g. Shell Oil Co. v. Marinello, 120 N.J. Super. 357 (N.J. Super Ct. 1972, aff'd 63 N.J. 402 (1973); Mobil Oil Corp. v. Rubenfeld, 72 M. 2d 392 (Queens County 1972), aff'd N.Y.L.J. 1/8/74 at 18 (2d Dep't 1974); DeTreville v. Outboard Marine Corp., 439 F. 2d 1099 (4th Cir. 1971).

3. Similarly, BP's representations were of such a nature and relied upon by Spiegel to such an extent that BP should be estopped from insisting upon the literal and merciless application of the acceleration clauses contained in the mortgages. This is the well settled law of this State, and it should be given effect in this action. See, e.g., Ferlazzo v. Riley, 278 N.Y. 289 (1938); Caspert v. Anderson Apartments, Inc. 196 Misc. 555 (Sup. Ct. N.Y. County 1949);

Domus Realty Corp. v. 3440 Realty Co., 179 Misc. 749, aff'd 266 App. Div. 725 (1st Dep't 1943); Witherell v. Kelly, 195 App. Div. 227 (2d Dep't 1921).

4. Finally, the July 11, 1973 "settlement agreement" was extracted from Spiegel when it had no other choice but to succumb to BP's might (A. 250-55). The evidence presented thus far is more than sufficient to establish duress, and to warrant the setting aside of the agreement (A. 369-70). See, e.g., First National Bank v. Pepper, 454 F. 2d 626 (2d Cir. 1972); Austin Instrument Inc. v. Loral Corp., 29 N.Y. 2d 127, 324 N.Y.S. 2d 22, 28 (1971).

CONCLUSION

The critical question to be determined on this appeal is whether Spiegel has made a sufficient showing justifying the intervention of the lower court's equitable powers. It is Spiegel's position that such a showing has been made. The evidence demonstrates that despite its oral and written representations to the contrary and despite a course of conduct evidencing a different intention, BP has embarked upon a plan whose undisguised goal is nothing less than the elimination of Spiegel and the destruction of its business.

This plan should not be permitted to succeed not only because it is violative of the EPA, but because it contravenes every settled principle of justice and equity fashioned by the law. Those principles, never static, continually developing and ever vigilant to the erosion of legitimate rights have had, as their single motivating impulse, that justice and right be done.

It is upon those principles that Spiegel's claim ultimately rests, and it is to those principles that it now points, imploring this Court to affirm Judge Judd's attempt to preserve the _status quo_ so that its claims may be fully and fairly presented.

For all of those reasons, it is respectfully requested that the order below granting the preliminary injunction be affirmed.

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~~Due and timely~~ service of ... copies of

the within brief ... is hereby admitted this

... day of December, 1974

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